Supreme Court, U.S.
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No. 94-1470

In The

Supreme Court of the United States

October Term, 1994

EVANS, INC.,

Petitioner,

v.

LARRY P. SPIERER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Larry P. Spierer, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Evans, Inc.

STATEMENT OF THE CASE

The following inaccuracies or omissions exist in the statement of the case by the Petitioner:

The regional manager over Koslow's was terminated by Petitioner early in 1991.

Cohen and Stern claimed in statements prepared for the response to the charge of discrimination filed with the Equal Employment Opportunity Commission that numerous and varied problems existed with Spierer's San Antonio store. Cohen claimed he directed Spierer to remedy the alleged deficiencies.

Cohen claimed he again inspected the store in a month or two, but Cohen and Stern assumed their new positions in January and the decision to terminate Spierer was made in February.

Spierer was only told that the reasons for his termination were "poor performance" and "failure to meet company expectations;" nothing more.

Spierer's replacement was not the former assistant store manager. Spierer's replacement had lost his position when Nordstrom's, in Washington, D.C., decided not to renew its lease with Petitioner.

At trial, the jury was instructed to answer question two "If and only if you find that age was a determining factor in the defendant's decision to terminate the plaintiff. . . . " (A. 5)

A panel of the Court of Appeals for the Fifth Circuit, assumed for purposes of their opinion, that the jury instructions and interrogatories, taken as a whole, failed to convey the appropriate legal standard in an accurate and clear manner. (A. 6)

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. The Fifth Circuit agreed with Petitioner that Respondent's burden under the Age Discrimination in Employment Act was to show age was a determinative factor in the decision to terminate Respondent.

II. Petitioner was not prevented from objecting to the submitted instructions and interrogatories; therefore, the Petitioner must prove there was fundamental error in the interrogatories and questions.

III. Petitioner incorrectly urges that "plain error" is the standard of review for the jury instructions and interrogatories. However, since the trial counsel did not object to the submitted instructions and interrogatories, the standard of review is fundamental error. Petitioner does not demonstrate the jury verdict resulted from fundamental error.

REASONS FOR DENYING THE WRIT

The challenge to the jury instructions and interrogatories does not present an issue warranting a Writ of Certiorari.

I. The Fifth Circuit correctly analyzed the required wording for the jury instructions and interrogatories.

Although Petitioner argues otherwise, it has failed to show that the discretionary review of this Court is needed to resolve a conflict between the Fifth Circuit and the other Circuit Courts of Appeal concerning the jury instructions and interrogatories in an Age Discrimination in Employment Act case. The Fifth Circuit in the instant appeal, not only agreed with Petitioner that Respondent was required to show age was a determinative factor in his discharge (A. 4), but found that the failure of the Trial Court to use this exact language in its charge as a whole prevented the accurate and clear conveyance of the appropriate legal standard. (A. 6). Essentially, the Fifth Circuit acknowledged in its opinion that this is the correct language, just as Petitioner requested.

Petitioner cites only a Seventh Circuit opinion as its basis for the contention that uncertainty exists among the circuit courts concerning the correct jury instruction in an age discrimination case. *Gehring v. Case Corp.*, 43 F.3rd 340 (7th Cir. 1994). Petitioner cleverly presents the dicta of *Gehring*, which urges trial courts to use simple and straightforward language in presenting complex legal issues to the jury, as if the Seventh Circuit decision found error in a question which asked the jury to decide if age was a "determining factor" in Gehring's termination. However, a full reading of the decision reveals the opposite is true. The Court affirmed the jury verdict and overruled the alleged error in the jury charge, concluding: "To say that jury instructions ought to avoid legalistic and ambiguous terms is not to say that an instruction

including them is reversible error." *Id.* at 344, citing with approval *Mayall v. Peabody Coal Co.*, 7 F.3rd 570, 573-74 (7th Cir. 1993). It is noteworthy that the *Mayall* decision specifically held the jury instruction using a determining factor ". . . . [e]xpresses the decisional system for discrimination cases constructed by the Supreme Court. The instruction thus correctly informed the jury of the applicable law." *Id.* at 574.

Not only does *Gehring* fail to present a conflict, but the decision below is unpublished and, therefore, cannot be used as authority to create a conflict.

Petitioner has presented no authority for the claim there is uncertainty among the circuit courts. The petition is totally inadequate to invoke discretionary review by this Court on this question.

II. Petitioner was not prevented from objecting.

The second question upon which Petitioner seeks a Writ of Certiorari does not warrant review by this Court. The opinion of the Fifth Circuit cites controlling authority which Petitioner has failed to call into question with any contradictory holdings in the Fifth Circuit or any other circuit. All counsel are required by the Federal Rules to be familiar with the Court rules and the order of proceedings for trial. There is nothing to suggest that trial counsel for Petitioner was prevented from making an objection by a hostile or uncooperative trial judge. The trial record convinced the Fifth Circuit that the trial judge

did not deny Petitioner its rights under Rule 51; therefore, the failure to object only entitled Petitioner to a review for fundamental error. (A. 4-5).

Question Number Two does not present a question of significant importance or one which needs clarification. To the contrary, the provisions of Rule 51 clearly require an objection to a jury instruction or definition to preserve the complaint for appellate review. This is not a novel question, but one that is well settled by case law. Rule 51 means what it says.

III. Petitioner does not demonstrate the jury verdict resulted from fundamental error.

As the opinion of the Fifth Circuit points out, the standard of review of any error in this jury charge is the two pronged fundamental error test. In this third question, Petitioner merely presents a variation of its complaint about the charge. The failure to object to the erroneous charge at trial precluded a review of the sufficiency of the evidence by the Fifth Circuit and precludes that review before this Court. While Petitioner naturally argues the evidence most favorable to it, the jury apparently did not believe that evidence. The Fifth Circuit correctly determined the evidence the jury obviously did believe was "some evidence" and adequate to support the jury verdict.

Respondent submits that Petitioner has misread or misstated the holding of *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). This Court in the *St. Mary's* decision recognized that if the jury

did not believe the employer's explanation for its decision, it may infer that the employer is trying to cover up its age discrimination. 125 L.Ed.2d 407, 418.

Respondent argues there is nothing new presented in the Petition for Writ of Certiorari. Petitioner merely wishes this Court to grant certiorari based on the jury argument which has already failed to convince the trier of fact. Although the Petitioner urges otherwise, the purpose of appeal is not to reweigh the evidence. In addition, the evidentiary determination of the Fifth Circuit does not present an issue which warrants review by this Court.

CONCLUSION

Respondent respectfully states that none of the questions outlined by Petitioner present an issue of such magnitude or complexity justifying the commitment of the scarce resources of the highest court. The Petition does not demonstrate the requisite elements to invoke the discretionary jurisdiction of this honorable Court and accordingly, Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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